

SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers

10 State Summary of Data Collection Regarding Appeals Processes and Recommendation for Appeals Process in Montana

January 2008

10 State Summary:

1. 7 States have an identified Appeal Processes (Alaska, Arizona, Idaho, Minnesota, New Mexico, Oklahoma and Oregon)
 - a. 3 limit the appeal to crimes which fall outside of their 'permanent' categories.
 - b. 4 use a committee structure to make decisions, while the other three involve a Commissioner or other designated department staff person.
 - c. 1 state limits appeals to areas involving their central abuse registries.
2. 2 States (Kansas and Nevada) limit the appeal process to the accuracy of the criminal record only. No other considerations are allowed.
3. 1 State—no response, nothing specific found in their on-line statutes.

Recommendation:

In conducting this research project, the states who have adopted an appeal process appear to have an administratively burdensome process which requires the commitment of a committee or an agency commissioner or staff person. The process requires that individuals submit considerable amounts of information, documentation and supportive materials that must be reviewed by the committee, the commissioner or the department representative. These individuals alone are then responsible for weighing the information and determining whether to allow these persons to be employed in the respective facilities. Most decisions are made within a 30-45 day period.

The 2 states that limit their appeal process to the accuracy of the criminal record only appear to have fewer burdens upon the administrative entity than the other states.

Based upon this research, discussions with QAD management staff and agency legal counsel it is recommended that Montana, at least initially, follow the strategies of Kansas and Nevada and adopt a process which limits any 'appeal' to the accuracy of the criminal history record only.

In establishing this process, it is recommended that the challenge be sought through the Department of Justice and would only apply to the specificity or correctness of the information contained within the criminal record.

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Alaska

- A. Appeals process is referred to as a *Request for Variance*.
- B. Appeals can only apply to crimes that are specified under the 10, 5, 3, or 1 year aged out categories. Appeals cannot be requested for those crimes listed as Permanent.
- C. Request for the variance is to be made by the 'entity' and is directed to state officials who will after a review refer and make a recommendation to grant or deny to a variance committee. This committee is appointed under Alaska state law.
- D. The request for variance must include information such as (1) a comprehensive rationale for why the variance should be granted; (2) a demonstration that in spite of the conviction, the health, safety and welfare of recipients will not be impacted; (3) copies of all known information relevant to (2) to include such things as copies of the criminal record, dispositions, final sentences, terms of parole or probation, etc; (4) letters of recommendation from credible persons (5) description of job duties and the extent to which the individual will have contact with persons receiving care.
- E. Variance Committee—3 or more department employees appointed by the Commissioner.
- F. Upon decision, the Commissioner notifies the entity or provider of the decision. In doing so, they do not identify the individual, but specify the crime or condition for which the variance was requested.
- G. The variance is only applicable to the entity who requested it. If the individual for whom the variance was granted leaves the employ of that entity, and seeks employment for another entity, a new variance must be requested. If they remain employed with the same entity for which the variance was granted, the variance remains in place.

Arizona

- A. Appeal process is known as *Good Cause Exception*.
- B. Every 'clearance' is based upon the issuance of a Fingerprint Clearance Card.
- C. Clearance is sought through the Board of Fingerprinting, which is part of the state Department of Public Safety.
- D. It appears that this division has a 'clearing house' system and compares the criminal record to the offenses that preclude a person from receiving a fingerprint clearance card.
- E. Individuals who want to work in a facility must present the fingerprint clearance card before they can be approved to work.
- F. Individuals who have been convicted of a crime outlined as a disqualifier, or those awaiting trial on the disqualifiers are precluded from receiving the clearance card except that the person may petition the board of fingerprinting for a good cause exception.
- G. The board of fingerprinting or its hearing officer shall determine if good cause exceptions can be granted.
- H. The board and its hearing officer will grant a good cause exception if the person shows to the board and HO's satisfaction that the person (1) is not awaiting trial or been convicted of a disqualifying crime or (2) that the person is successfully rehabilitated and is not a recidivist.
- I. Before granting a good cause exception the following is considered:
 - 1. The extent of the criminal record
 - 2. The length of time that has elapsed since the offense was committed
 - 3. The nature of the offense
 - 4. Any applicable mitigating circumstances

5. The degree to which the person participated in the offense
6. The extent of the person's rehabilitation. This would include completion of probation, parole, or community supervision, whether restitution was paid and evidence of positive action to change criminal behavior (such as completing a drug treatment program), and personal references attesting to the persons rehabilitation.

Kansas

The State of Kansas does not have an appeal process. There has so far been sort of a conscious effort to avoid establishing any type of appeals process. Kansas allows the individual to follow the appeal process established through the criminal justice legal system. If they are successful in getting a conviction overturned or expunged then officials will rescind the prohibition. Kansas does see a few criminal records that have been expunged each year on individuals that have been previously prohibited.

Idaho

- A. Appeals process is referred to as ***Exemption Reviews***
- B. An individual can only request a review of a conditional denial (this would be like what we're referring to as "other than permanent" disqualifier). If a disqualifier falls into the 'unconditional' category, Idaho does not allow a review to occur.
- C. The review may consist of examining documents and supplemental information provided by the individual, a telephone interview, an in person interview or any other review the department deems necessary.
- D. Factors Considered at Exemption Review:
 1. The severity or nature of the crime or other findings;
 2. The period of time since the incident under view occurred;
 3. The number and pattern of incidents;
 4. Circumstances surrounding the incident that would help determine the risk of repetition;
 5. Relationship of the incident to the care of children or vulnerable adults;
 6. Activities since the incident, such as continuous employment, education, participation in treatment, payment of restitution, or any other factors that may be evidence of rehabilitation;
 7. Granting of a pardon by the Governor or President; and
 8. The falsification or omission of information on the application form and other supplemental forms submitted.
- E. Exemption Review Determination: The department determines the individuals suitability based upon the information provided during the exemption review.
- F. The department's exemption review decision is effective for 3 years from the date of the notice decision.
- G. Exemption Reviews may be appealed under Idaho's Contested Case Proceedings rules.
 1. Filing this notice does not 'stay' the action of the department.
 2. The individual who appeals must establish that the department's denial was arbitrary and capricious.
- H. Any individual who has had a denial under the exemption review within the previous 3 years will be automatically denied.

Minnesota

- A. Appeals process is referred to as ***Reconsideration***.
- B. Minnesota, depending upon the program, has several sources who make the disqualification determination—county agency, Commissioner of State Department, and private agencies (i.e., adoption...). *However the Commissioner is the only one that makes the decision to offer reconsideration. The Commissioner not only reviews criminal disqualifications, but also reviews disqualification concerning Maltreatment (is similar to*

- our child and family services reviews) and disqualification concerning adoption/foster care family studies.*
- C. The disqualified individual can request reconsideration on the following basis and must submit the following information showing that:
1. Information relied upon in making the disqualification was incorrect;
 2. The subject must show they pose no risk of harm to any person they would serve.
 3. The subject must specify which program they are applying for employment and this information must be included in the request for reconsideration.
- D. Review and Action of a Reconsideration Request
1. If the information was inaccurate, a decision to rescind the disqualification is made.
 2. If RISK is the criterion being used, commissioner must give preeminent weight to the safety of each person served. The disqualification can be set aside if the commissioner finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm. In making this consideration, the commissioner considers:
 - a) the nature, severity and consequences of the event that led to the disqualification;
 - b) whether there is more than one disqualifying event;
 - c) the age and vulnerability of the victim at the time of the event;
 - d) the harm suffered by the victim;
 - e) vulnerability of persons served by the program;
 - f) the similarity between the victim and the persons served by the program;
 - g) the time elapsed without a repeat of the same or similar event.
 - h) documentation of successful completion by the individual, training or rehabilitation relevant to the event;
 - i) any other documentation relevant to reconsideration.
- F. Scope of the set aside decision
1. If a decision to set aside a disqualification is made, the individual remains disqualified but is able to have direct contact with persons being served. *This set aside decision is limited solely to the program specified in the request for reconsideration unless otherwise specified. In some cases, the set-aside may further be limited to a specific person receiving services.*
- G. Recision of set aside decision—The commissioner may rescind a previous set aside disqualification if new information comes to his/her attention indicating that the person now poses a risk of harm to persons being served. If such decision is made, appeal rights apply.
- H. Notice Requirements
1. notice the individual
 2. if decision was upheld and the disqualification was not set aside, notice must go to employing entity to immediately remove the individual from any position in which he/she has direct contact with persons receiving services.
- I. When disqualification is not set aside, the individual has the right to request a formal fair hearing.

Nevada

Upon receiving information from their Central Repository of Criminal Records, any employee or independent contractor who has been convicted of a disqualifying crime shall be terminated from employment or not allowed to begin employment. The only 'appeal' is regarding the accuracy of the criminal record. According to the state law information, if the individual in question has already begun employment when the disqualifying criminal history is found, that person has a

reasonable amount of time of not less than 30 days to correct the information. If the information cannot be changed or corrected, the person is terminated from employment.

New Mexico

- A. Appeals process is referred to as ***Administrative Reconsideration***.
- B. An individual who has received notification of a disqualifying criminal history record, may submit a written request for administrative reconsideration.
- C. The documentation submitted with the request for an administrative reconsideration may include the following:
 - 1. Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history was incomplete.
 - 2. The age of the individual at the time of each disqualifying conviction;
 - 3. Any mitigating circumstances when the offense was committed.
 - 4. Any court imposed sentence or punishment and if completed, the date of completion;
 - 5. Any successfully completed rehabilitation program since the offense;
 - 6. The individuals full employment history since the disqualifying convictions;
 - 7. Other relevant materials the individual may wish to submit.
- D. Reconsideration Proceeding:
 - 1. Intended to be an informal non-adversarial administrative review of written documentation.
 - 2. Conducted by a committee designated for that purpose; established by the department;
 - 3. This committee will issue determination based upon the completed request for reconsideration and all supporting documents submitted. Additional documentation can be requested by this committee.
- E. Factors in Making Determination:
 - 1. Must consider the Criminal Offender Employment Act (Section 28-2-1 through 28-2-6 of the NMSA
 - 2. Total number of disqualifying convictions;
 - 3. Time elapsed since last disqualifying conviction or since discharge of the sentence;
 - 4. Circumstances of the crime including whether violence was involved;
 - 5. Activities evidencing rehabilitation (substance abuse or other rehab programs);
 - 6. Whether conviction was expunged by the court or whether an unconditional pardon was granted;
 - 7. False or misleading statements about any conviction in the signed declaration;
 - 8. Evidence that the individual poses no risk of harm to the health and safety of care recipients; and
 - 9. age of the individual at time of the disqualifying conviction.
- F. Grounds for Reconsideration Clearance Determination:
 - 1. Clearance can be given when the request for reconsideration and the accompanying documentation clearly demonstrates that the individual has satisfied *one* of the following three grounds for such clearance:
 - a) Inaccuracy—the record inaccurately reflects a disqualifying conviction. Includes factual error, error in the departments application or use of the applicable criminal statute/standard, conviction that lacks a final disposition
 - b) No Risk of Harm—
- G. Allow for Employment pending clearance determinations UNDER STRICT SUPERVISION.

Oklahoma

- A. Licensed professionals are required as a condition of their license to undergo a criminal background check; as a result, Oklahoma limits background checks to persons designated as nurse aides and ‘non-technical’ workers.
- B. From the research conducted, it appears there is no formal appeal process with regard to criminal history disqualifiers, but the appeal process appears to apply to their abuse registry.
 - 1. Appears to be a process involving an Administrative Law Judge; if the findings of this administrative law judge are adverse, the individual can appeal through the district court.
- C. The statute does mention that persons addicted to any schedule I through V drug, shall not be employed unless the person produces evidence that he/she has successfully completed a drug rehabilitation program.

Oregon

- A. All crimes listed in the statute are considered ‘potentially’ disqualifying, regardless of their permanent or aged out status.
- B. When an individual applies to be an employee in a facility, he/she undergoes a “fitness determination”, which appears to include a review of the criminal record and other considerations. This is conducted by authorized entity which usually is the facility contact but can be the department in specific situations. If the individual does not have a criminal history, and the record check shows no other considerations, the individual can be approved.
- C. If the individual has a potentially disqualifying criminal history, or discloses potentially disqualifying history, the individual is placed on a probationary status pending the preliminary ‘fitness’ determination. This determination includes a review of the criminal history and a weighing test. As statute is read, this weighing test is a review conducted by one or more authorized designees in which known negative and positive information is considered to determine if a subject individual is approved or denied. Under the weighing test the following outcomes are present: Probationary, Approved, Restricted Approval or denial.
- C. Appears that two appeals are mentioned in the statutes:
 - 1. Dispute involving the criminal history—must go directly to the Oregon State Police, the FBI or other agencies reporting this information.
 - 2. Challenge of the fitness determination.
- D. Appeals regarding challenges of fitness determination follow a contested case hearing allowing for an informal administrative review. If the decision at this level is adverse to the individual, the individual may appeal to a more formal setting which involves an administrative law judge.

Washington

Information was not readily available within the research and review of Washington Statutes. Attempts to contact state level program persons was not successful.